SYARIKAT SEE WIDE LETRIK SDN BHD

v.

BRUNSFIELD COMMUNICATIONS SDN BHD

COURT OF APPEAL, PUTRAJAYA
ZALEHA ZAHARI JCA
ZAINUN ALI JCA
ZAHARAH IBRAHIM JCA
[CIVIL APPEAL NO: W-02-1206-2005]
18 FEBRUARY 2011

CIVIL PROCEDURE: *Appeal - Appeal against judgment of High Court - Whether trial judge misdirected himself as to facts and evidence presented before him in arriving at decision - Evaluation of the evidence adduced*

CONTRACT: *Supply of goods - Failure to accept delivery - Call made on bank guarantee by appellant supplier - Respondent disputing call on guarantee instituted action in High Court - Trial judge finding in favour of respondent - Whether fraud allegation accepted on a balance of probabilities - Whether failure to accept delivery negated - Whether failure to call critical witnesses considered - Whether losses and liability proved - Whether trial judge's findings a misdirection - Whether appeal allowed*

The respondent by a Letter of Award ('LA') offered the appellant a sub-contract in relation to the Supply, Delivery and Certification of a specific type of 'Structure Cabling Systems' for Phase 1A of the Government Complex Development by Putrajaya Holdings Sdn Bhd which had been part of a government project ('the work'). The appellant accepted the respondent's offer and Appendix E of the LA provided a detailed account of the delivery of the equipment by the appellant, failing which liquidated and ascertained damages ('LAD') would be incurred. To secure the respondent's performance under the LA, an unconditional and on-demand Bank Guarantee ('BG') was procured from Hong Kong Bank Malaysia Bhd ('bank'). The respondent revised the delivery schedule for the equipment on three occasions and on those three occasions too, requested the appellant to withhold delivery of the equipment pending further notice. The appellant agreed to those requests but only up to 31 August 1998, after which it said it would proceed to deliver the equipment to the respondent. Then

in November 1998, the appellant wrote to the respondent stating that the latter had unilaterally terminated the LA by breaching it and sought for a sum of monies. It further called on the BG. The respondent disputed the appellant's call on the BG and instituted an action in the High Court, wherein the decision was in favour of the respondent. Hence this appeal.

Held (allowing the appeal)
Per Zainun Ali JCA delivering the judgment of the court:

(1) The allegation of fraud had been by the respondent and they had thus borne the burden of proving it beyond reasonable doubt. However the trial judge, notwithstanding the above burden, had accepted the respondent's evidence through its witnesses on a balance of probabilities. (paras 80 & 81)

(2) The trial judge had made findings of fact of delay on the respondent's part in accepting delivery of the equipment and had also found the respondent in breach of its obligation under the LA. The trial judge however had failed to appreciate the respondent's burden of proof to negate the appellant's claim. (paras 82 & 83)

(3) The trial judge had failed to put issues of fraud and/or dishonest intention to the appellant's witnesses and the respondent had failed to show how and in what manner the appellant had been fraudulent. In fact the trial judge had not considered the question as to why the respondent had not put questions of fraud and dishonesty to the appellant's witnesses. (para 84)

(4) The trial judge had failed to appreciate the fact that the respondent had failed to call direct witnesses to contradict critical facts which had pointed to its refusal to accept delivery and/or its inability to complete or proceed with its contractual obligations. The trial judge had also failed to appreciate the fact that the meeting of 9 November 1998 had established the respondent's intention not to honour their obligations and/or to reimburse the appellant in the sum of monies, and he had failed to appreciate the existence of a motive on the respondent's part in withholding and refraining acceptance, which had been due to the Stop Work Order issued against it. (para 85)

(5) The trial judge failed to appreciate that the substance of the respondent's claim had not been for losses for breach of contract but for the loss in the payment for the goods *vide* the BG. More importantly, the trial judge had failed to appreciate that the respondent had failed to prove liability on the appellant's part and losses on its part. In fact the trial judge's decision spoke of events post November 1998 which had been a non-issue as it had not been before the court. (paras 86)

Bahasa Malaysia *Translation Of Headnotes*

Melalui sepucuk Surat Award ('SA'), responden telah menawarkan kepada defendan/perayu satu kontrak kecil berkenaan Pembekalan, Penghantar-serahan dan Perakuan (Certification) bagi kontrak 'Structure Cabling Systems', Fasa 1 Pembangunan Kompleks Kerajaan oleh Putrajaya Holdings Sdn Bhd yang merupakan sebahagian daripada projek kerajaan ('kerja tersebut'). Perayu telah menerima tawaran responden dan Lampiran E SA tersebut telah memperuntukkan secara terperinci butir-butir untuk penghantarserahan peralatan oleh perayu, kegagalan di mana gantirugi yang ditetapkan ('gantirugi') akan dikenakan. Untuk memastikan perlaksanaan responden di bawah SA tersebut, suatu Jaminan Bank ('jaminan tersebut') tanpa syarat dan atas tuntutan telah diperolehi daripada Hong Kong Bank Malaysia Bhd ('bank'). Responden telah mengubah jadual penghantaran bagi peralatan tersebut sebanyak tiga kali dan untuk tiga kali itu, telah meminta perayu untuk menahan daripada menghantar peralatan tersebut sehingga diberitahu. Perayu telah bersetuju kepada permohonan responden tersebut tetapi hanya sehingga 31 Ogos 1998, dan responden telah diberitahu bahawa selepas tarikh tersebut, peralatan akan dihantarserahkan kepada mereka. Kemudian pada bulan November 1998, perayu telah menulis kepada responden memberitahu mereka bahawa mereka telah menamatkan SA tersebut secara unilateral melalui tindakan mereka mengingkarinya dan seterusnya telah menuntut untuk sejumlah wang. Kemudian perayu telah membuat permintaan ke atas Jaminan tersebut. Responden mempertikaikan permintaan perayu ke atas jaminan tersebut dan suatu tindakan telah difailkan di Mahkamah Tinggi, di mana keputusannya berpihak kepada responden. Oleh itu, rayuan ini telah difailkan.

A **Diputuskan (membenarkan rayuan)**
Oleh Zainun Ali HMR menyampaikan penghakiman mahkamah:

(1) Dakwaan fraud telah dibangkitkan oleh pihak responden dan beban pembuktiannya di atas tahap yang melampaui keraguan yang munasabah terletak di pihak mereka. Hakim bicara walaupun wujud beban pembuktian seperti di atas, telah menerima keterangan responden melalui saksi-saksi mereka atas tahap imbangan kebarangkalian.

(2) Hakim bicara telah membuat dapatan fakta mengenai kelewatan responden untuk menerima peralatan tersebut dan juga telah mendapati bahawa responden telah memungkiri obligasinya di bawah SA tersebut. Walaubagaimanapun, hakim bicara gagal untuk menghargai beban responden untuk menafikan dakwaan perayu.

(3) Hakim bicara telah gagal untuk mengemukakan isu berkenaan fraud dan/atau niat tidak jujur kepada saksi-saksi perayu dan responden telah gagal untuk menunjukkan bagaimana dan dengan apa cara, perayu telah bertindak dengan menipu. Hakim bicara tidak mengambil kira sebabnya responden tidak mengemukakan soalan berkenaan fraud dan ketidakjujuran kepada saksi-saksi perayu.

(4) Hakim bicara gagal untuk menghargai fakta bahawa responden telah gagal untuk memanggil saksi-saksi secara terus untuk menyangkal fakta-fakta kritikal yang jelas menunjukkan keengganan mereka untuk menerima dan/atau ketidakupayaan mereka untuk menghabiskan atau meneruskan dengan obligasi mereka di bawah kontrak. Hakim bicara juga gagal untuk menghargai fakta bahawa perjumpaan pada 9 November 1998 telah menunjukkan niat responden untuk tidak lagi menghormati kewajipan mereka dan/atau untuk membayar semula kepada perayu jumlah wang tersebut, serta gagal untuk menghargai kewujudan motif di pihak responden dalam tindakan mereka menahan dan menolak dari menerima peralatan tersebut, disebabkan Arahan Henti Kerja yang dikeluarkan terhadap mereka.

(5) Hakim bicara telah gagal untuk menghargai fakta bahawa tuntutan responden adalah untuk kehilangan bayaran bagi peralatan tersebut melalui jaminan tersebut dan bukan untuk kerugian disebabkan kemungkiran kontrak. Yang lebih penting adalah bahawa hakim bicara telah gagal untuk menghargai bahawa responden telah gagal untuk membuktikan liabiliti pihak perayu dan kerugiannya. Malah keputusan hakim bicara menceritakan berkenaan peristiwa-peristiwa selepas November 1998 yang mana ianya bukan merupakan suatu isu di hadapan mahkamah.

Case(s) referred to:

Isito Electronics Sdn Bhd v. Teh Ah Kiam & Anor [2004] 3 CLJ 272 HC ***(refd)***

Yew Wan Leong v. Lai Kok Chye [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330 SC ***(refd)***

For the appellant - Chan Kah Meng (Chow Siew Wai with him); M/s Chooi Saw & Lim

For the respondent - CJ Ooi; M/s Raslan Loong

Reported by Sharmini Pillai

JUDGMENT

Zainun Ali HMR:

[1] The respondent by a letter of award dated 16 April 1998, offered the defendant (appellant) a sub-contract in relation to the Supply, Delivery and Certification of a specific type of "Structure Cabling Systems" for Phase 1A of the Government Complex Development by Putrajaya Holdings Sdn Bhd which is part of a government project. Hereinafter referred to as "the work".

[2] The work is related to the contract for the Supply, Delivery, Installation, Testing and Commissioning for the Extra Low Voltage Electrical Services and All Associated Works for the Proposed Development of Phase 1a of the Government Complex Development, hereinafter referred to as "the project". The several parties involved in the project are as follows.

[3] The main contractor in respect of the project is Fidelity Supplies Sdn. Bhd. Fidelity then subcontracted the works to Destine Computers Sdn. Bhd., which then subcontracted it to Brunsfield Information Technology, (the respondent) which in turn then subcontracted the works to the appellant.

[4] The appellant accepted the respondent's offer on 27 June 1998.

[5] Appendix E of the letter of award provides a detailed account of the deliveries of the equipments by the appellant. The deliveries were to be made on three occasions ie, on 7 July 1998, 14 July 1998 and 21 July 1998 respectively. The terms were to be strictly observed for failure to comply would result in the appellant being liable for liquidated and ascertained damages (LAD) of RM4,000 per day.

[6] The equipments to be delivered by the appellant to the respondent are as set out in Appendix B, known as the "Mod-Tap Products".

[7] To secure the respondent's performance under the said letter of award, an unconditional or "on-demand" Bank Guarantee (No. GTE PJA 980995 dated 8 June 1998) was procured from Hong Kong Bank Malaysia Bhd. ("the bank"). This is clear from the terms of the Supplementary Terms and Conditions of the letter of award, which provides that payment for the equipment shall be made by the plaintiff to the defendant 90 days from the date for delivery and that payment shall be guaranteed by a mutually agreed bankers guarantee.

[8] It was not in dispute that the respondent had revised the delivery schedule for the equipment on three occasions, to the appellant.

[9] The first was by a letter dated 15 June 1998 where the respondent forwarded to the appellant a revised delivery schedule for the equipment.

[10] The second was by a letter for 1 July 1998 to the appellant, where the respondent forwarded a further revision to delivery schedule for the equipment.

[11] The third was by a letter of 9 July 1998 to the appellant, for a further revision to the delivery schedule for the equipment.

[12] Then by a letter of 20 July 1998, the respondent requested the appellant to withhold delivery of the equipment set out as items 2, 3, 4, and 5 in the list of equipment pending further notice. This same instruction was repeated in a letter dated 23 July 1998.

[13] A third letter dated 25 August 1998 requested the appellant to withhold the delivery of the equipment until the end of August 1998. The appellant's solicitors letter of 26 August 1998 indicated agreement to this request until 31 August 1998 and that the appellant will proceed thereafter, to deliver the equipment to the respondent.

[14] On 10 November 1998, the appellant's solicitors wrote to the respondent indicating that the respondent had unilaterally terminated the letter of award and thus had breached the terms of the letter of award for the sum of RM400,000.

[15] The appellant by letter of 11 November 1998 then called on the bank guarantee on the basis of the respondent having defaulted in the payment under the letter of award.

[16] The respondent disputed the appellant's call on the said bank guarantee. Thus on 20 November 1998 the respondent instituted action in the High Court.

[17] In view of the above, it would be instructive to begin with the submission of the respondent.

The Respondent's Case

[18] It is the respondent's case that the appellant was under an obligation to deliver the equipment set out in Appendix B of the letter of award, in accordance with the delivery schedule set out in Appendix E, subject to variations as provided for by cl. 3 of the Supplementary Terms and Conditions set out in Appendix D (p. 4 of "B"). The respondent stated that such variations did take place during the period of the letter of award.

[19] The respondent contended that the bank guarantee is conditional and not otherwise. This is because the bank's liability thereunder is contingent upon the appellant showing that there are sums owing to it and the total amount of the said sums. The respondent further contended that it was incumbent upon the appellant to show that the sum claimed was owing to it at the time of making a call on the guarantee.

[20] In that connection, the respondent took issue with the appellant's statement as a fact that the respondent had failed or refused to accept delivery of the said equipment.

[21] The respondent contended that the LAD clause is applicable only between it and the appellant. Since the delivery obligation was subject to variation as provided for under cl. 3 of the Supplementary Terms and Conditions, the imposition of LAD would depend on the nature of variations made to the delivery schedule. The respondent contended that it made the various revisions in accordance with the delivery schedule and thus there was no question of imposing LAD on the appellant in adhering to the delivery schedule as varied.

[22] The respondent denied the claims made by the appellant's witnesses DW1 and DW2, that the respondent had abandoned the allegations of making a false or fraudulent representations to the bank to claim on the bank guarantee and that the respondent had departed from its pleadings.

[23] The respondent contended that the appellant did not have the necessary equipment in hand in the first place, to deliver to the respondent on 7 July 1988, despite its letter on even date that the equipment was ready for delivery, since the supplier in its letter of 24 August 1998, had stated that the stock had been in its warehouse, waiting to be dispatched. Based on this fact, the respondent thus argued that the only contemporaneous document tendered to the court showed that the equipment was not in the appellant's possession as at 7 July 1998.

[24] Moreover, the respondent contended that though it requested the appellant to withhold delivery on three occasions, there was no formal protest from the appellant. The respondent contended that in fact the appellant actually agreed to withhold delivery of the equipment until 31 August 1998 as requested by the respondent. Thus it is the respondent's case that the appellant's contention of its strenuous protest (regarding the respondent's revision) must be properly weighed and considered; and in this light the respondent contended that it lacked credibility in view of the contemporaneous documents.

[25] The respondent refuted the appellant's contention that it required particulars from the respondent to deliver the equipment to it, to which the respondent did not respond. The respondent's case is that the appellant, for all its alleged threats and protestations, had not, until now delivered to the respondent. The

respondent further contended that in fact the appellant had called on the bank guarantee on 11 November 1998, even before issuing the letter dated 11 November 1998 to the respondent.

[26] Thus the respondent's contention is that it is not so much for the respondent to show that the appellant had failed to deliver the equipment prior to and until the commencement of the legal action, as it is for the respondent to show that the appellant did not have a basis for calling on the bank guarantee on 11 November 1998, since the appellant had not established that the respondent had refused to accept delivery. It is also the respondent's case that in all probability the appellant did in fact consented to the deferment of the delivery schedule.

[27] The respondent stressed that the issue is that when it had failed or refused to accept delivery on the date in question, the appellant, without more, called on the bank guarantee. The respondent stated that not only did it NOT fail or refuse to accept delivery of the equipment as at 11 November 1998, the respondent never failed or refused to accept delivery of the equipment as evidenced by its subsequent request of 18 January 1999 to the appellant to deliver the same.

[28] As regards certification of the Mod-Tap Products, it is the respondent's contention that cl. 7 of the letter of award did not state that certification by the manufacturer is to take place only after the installation of the equipment.

The Appellant's Case

[29] It is the appellant's case that under the terms of the contract between the respondent and the appellant, the appellant is to deliver the equipment in accordance with the schedule and the respondent is to pay the appellant within 90 days from the date of delivery. However the appellant contended that it was unable to deliver the said equipment solely due to the constant requests by the respondent to defer and receive delivery. The respondent made no less than three such requests ie, on 7 July 1998, 14 July 1998 and 21 July 1998 respectively. The appellant's contention is that the respondent's action of constant deferment of accepting delivery of the equipment caused grave difficulty to the appellant in executing its job of supplying, delivering and certificating the structural cabling system.

[30] One of the appellant's witnesses, one Mr. Chin Chee Kong who is the Project Manager, testified that the appellant called up the respondent a number of times for delivery to be executed and for the delivery order and invoice to be signed, but that the persons who answered him (Mr. Yeoh or Mr. Gan) would keep on asking the appellant to hold on not to deliver just yet. (See p. 122 appeal record).

[31] Mr. Chin's testified and reiterated that under the contract the appellant's job was to supply, deliver and certify the structural cabling system.

[32] However the job of certification could not be done by the appellant for this simple fact – that the certification process can take place only when the appellant installed the material with the fresh panel, fresh plate, fresh cord and fibre cable to the site and these are all then to be tested by them.

[33] Thus the job scope of the appellant would be to do the above, whilst the respondent's job is to verify whether the point and the workmanship is correct so that a report can be submitted back to Mod-Tap Malaysia. The latter will submit the report and certification to Mod-Tap USA which will then issue the letter of warranty. But none of these can be done if the respondent do not take delivery of the equipment in the first place.

[34] The appellant also refuted the respondent's allegation that the appellant had not protested the respondent's constant revision of the date for delivery.

[35] Through Mr. Chin, the appellant refuted the said allegation of non-protestation. In fact it was Mr. Chin's contention that the appellant had made the entire Mod-Tap (see B28 Mod-Tap's letter dated 16 June 1998, where B28-29 is the confirmation of the entire Mod-Top order) order because it is cheaper that way; and because of this bulk order, the appellant had to stock them in the warehouse since July. In that connection, Mr. Chin went on testify that the failure of the respondent to take delivery meant that the appellant had to continue to pay the holding costs in the warehouse plus interests etc. (See p. 123 appeal record).

[36] According to Mr. Chin the products are imported from various parts of Australia or Hong Kong though some are locally produced. Based on the above facts, the appellant's view is that the respondent's contention thus fall on thin ground

[37] After having heard submissions and read evidence of both sides, the events giving rise to this appeal fall within a fairly narrow compass. The critical factors to be considered are these.

[38] Under the said project, under the directive of the Prime Minister's Office, contractors were required to comply with the scheduled time and no variation would be permitted unless it came from Teamstead Sdn. Bhd. and Putrajaya Holding Sdn. Bhd. (ie, the owners of the said office project). (This was part of cl. 3 of the Supplementary Terms and Conditions and Contract).

[39] To ensure performance of the contractual obligations on the appellant's part, it was agreed that the Liquidated and Ascertained Damages (LAD) of RM4,000 per day would be imposed on the appellant in the event of delay (see cl. 2 of Supplementary Terms and Conditions p. 4 of Common Bundle of Documents and item (f) in letter of award dated 16 April 1998).

[40] It was also agreed that upon the execution of the said contract the appellant must immediately commence the contracted job and any delay would cause the appellant to pay a penalty of RM4,000 per day. To do this the appellant must incur expenses upfront in procuring the necessary equipments from overseas and take the risks of securing those equipments with letters of credit, since these equipments are special equipments in that there is no ready market for it domestically in Malaysia. Thus the risks are heightened since non-performance by the respondent would cause tremendous losses to the appellant. So it is imperative that the respondent (who had agreed to provide a bank guarantee) ensure due performance of its contractual obligations under the said contract.

[41] Looking at the terms of the bank guarantee, it is our view that it was intended to be an "on-demand guarantee".

[42] Looking again at the letter of award and Appendix E, under the Material and Equipment Delivery Schedule, it is crucial to determine under the contract what was the timeline in which the appellant had to deliver to the Mod-Tap Products.

[43] It could be seen that under the contract the appellant had to deliver them (the Mod-Tap Products) in three (3) deliveries/ instalments ie, on 7 July 1998, 14 July 1998 and 21 July 1998 respectively. As could be seen, the delivery dates were one week apart from each other, which means that the supply of all the Mod-Tap Products must be secured by the appellant within a short period of time and under these circumstances, the supplier would require letters of credit to secure against high business risks.

[44] It is the appellant's case that even before the first delivery ie, on 7 July 1998, at the respondent's request, the appellant had delivered to the respondent part of the Mod-Tap Products which amounted to RM24,000. This was done so that the respondent could examine the products and satisfy itself of the quality of the same. This would also ensure that the respondent would be confident that the appellant would be able to fulfil its contractual obligations.

[45] The appellant's further contention in that it had complied with its contractual obligations by ordering the Mod-Tap Products for the first delivery on 7 July 1998 (see pp. 28-30 Common Bundle of Documents – appear to be in order).

[46] The above facts were strengthened by a letter from Mod Tap (Malaysia) Sdn. Bhd. to Setia Putrajaya Sdn. Bhd. informing the latter that 35% of the items had been delivered to the appellant since July 1998 (p. 1 of the additional common bundle of documents).

[47] It is the appellant's case that the first delivery of the equipment did not take place since the respondent had refused or failed to accept delivery of the same. The respondent issued a letter dated 1 July 1998 to that effect and gave a purported revised schedule.

[48] Contrary to the respondent's assertion, the appellant's case was that it protested against the purported revised schedule for the following reasons:

(1) The Mod-Tap Products were secured by letters of credit. The purported revised schedule withholding delivery of most of the Mod-Tap Products for the first delivery had the consequence of causing critical cash flow problems to the appellant, resulting in the appellant being in default in paying the supplier.

(2) Non-payment to the supplier has the effect of the letters of credit being invoked which would have a detrimental impact on the appellant's reputation as well as its debtor's credit with the suppliers.

[49] In view of the above the appellant's case is that the purported revised schedule was made by the respondent unilaterally, without authority or permission from the owners of the said development project. The appellant would not have agreed to the said revision since any delay in delivery would cause the appellant a penalty of RM4,000 per day in LAD since there was no indication from the owner of the said project to the appellant that no penalty would be imposed for non-compliance with the purported revised schedule.

[50] It is the appellant's case that the matter was exacerbated with there being no explanation given to the appellant by the respondent for revising the delivery schedule.

[51] Due to the respondent's revision of the delivery and despite the appellant protests, the delivery did not take place.

[52] The respondent then sent a second revised schedule, *vide* its letter of 9 July 1998 to the appellant (pp. 34-35 appellant bundle of documents).

[53] It is the appellant's case that the respondent's second schedule meant that the respondent had unilaterally extended the delivery dates from three (3) instalments to five (5) instalments ending on 24 August 1998.

[54] The appellant contended that their protestations were not taken seriously by the respondent.

[55] In fact the respondent then issued a further request to the appellant in a letter dated 20 July 1998, to request the appellant to withhold delivery of the Mod-Tap Products. In fact this letter made matters worse, when it was silent as to when the date of delivery would be. (p. 102 in common of bundle).

[56] Then on 23 July 1998, the respondent issued another letter to the appellant requesting that delivery of the Mod-Tap Products be withheld. (p. 103 in common of bundle).

[57] The appellant issued a letter of complaint dated 4 August 1998 in reply.

[58] The situation worsened when on 7 August 1998 the respondent issued another letter of request to the appellant to withhold the first delivery of the Mod-Tap Products. To compound the problem, the respondent even requested the appellant to withhold the ordering of further deliveries. (See pp. 105-106 in the common of bundle).

[59] The appellant's case is that it never agreed to the withholding of delivery since its position is clear in that it wanted to comply strictly with the terms of the contract at all times.

[60] The record showed that when the respondent's letter of 7 August 1998 was issued (to withhold delivery), there was already a Stop Work order given by Destine Computers Sdn. Bhd. to Fidelity Supplies Sdn. Bhd. (p. 104 of common of bundle). This meant that the respondent, being the sub-contractor for Destine Computers Sdn. Bhd., had also lost the sub-contract work and could not accept any delivery of Mod-tap Products anymore.

[61] However, the respondent did not disclose this fact to the appellant (in its 7 August 1998 letter).

[62] The respondent in fact, pretended as if there was no problem at all with the contract and continued the charade – so much so that when the appellant sent a fax on 21 August 1998. to the respondent, reminding the respondent of the amount of Mod-Tap Products which were ready for delivery by the appellants, the respondent went on with this pretense by requesting the appellant to withhold delivery of the Mod-Tap Products *vide* its letter dated 15 August 1998.

[63] The respondent's action above was clearly self-serving. The respondent's performance of its contractual obligation under the contract was secured by the bank guarantee. It was therefore in its interest that its inability to perform its part of the contractual obligation not be revealed, for it ran the risk of entitling the appellant to call on the bank guarantee immediately.

[64] In view of the "piling up" of the Mod-Tap Products in the warehouse (due to the respondent's refusal to take delivery), the appellant issued its solicitor's letter dated 26 August 1998 to the

respondent to place on record that it had never agreed nor condoned the respondent's breach in failing or refusing to accept the appellant's delivery of the Mod-Tap Products. The said letter also indicated that should there be any further delay of taking delivery by the respondent, losses and damages would ensue. The appellant thus urged the respondent to take delivery by 31 August 1998.

[65] There was no answer from the respondent on the appellant's letter above.

[66] It was only on 7 November 1998 that the respondent's representatives, Mr. Gan Thin Gee and Mr. Yap Cheng Hong met with the Appellant's Project Manager Mr. Chin Chee Kong and Mr. Yeoh Kim Wah, the appellant's Marketing Director.

[67] At this meeting, the respondent proposed to call off the contract by offering to the appellant the sum of RM10,000 as compensation. It was rejected by the appellant in view of the value of the Mod-Tap Products being worth approximately RM1.44 million. There was a counter proposal by the appellant which was not accepted by the respondent.

[68] It is clear thereafter, in the circumstances of this case that the respondent had defaulted in its contractual obligations. This and the existing Stop Work order between Destine Computer Sdn. Bhd. and Fidelity Supplies Sdn. Bhd. made it clear to the appellant where the land lies. The appellant also realised that the bank guarantee would lapse or expire sometime in January 1999. The appellant then instructed its solicitor to write to the respondent on 10 November 1998 to inform the respondent and the bank that the respondent's default in failing or refusing to accept appellant's delivery had caused it losses and damages exceeding RM400,00 and that the appellant would proceed to take necessary steps to protect its interests against the losses and damages it suffered as a result of the respondent's breach.

[69] The respondent protested and through its solicitor wrote to the bank on 13 November 1998 demanding that the money under the bank guarantee not be released.

[70] The appellant's rebuttal was swift. It contended that the Mod-Tap goods piling up in the warehouse amounted to RM400,129 and on top of that the respondent had failed to pay for the earlier delivery of the Mod-Tap Products amounting to RM24,000.

[71] It must be borne in mind that the respondent had requested the appellant to withhold delivery of the equipment until 31 August 1998.

[72] But of course as events had shown, that date passed by without any word from the respondent to ask the appellant to deliver the goods.

[73] The appellant's letter of 11 November 1998 making a call on the bank guarantee citing the respondent's default was not disputed. It is not open for the respondent to now deny and dispute breach on its part.

[74] The period falling for the court's determination was limited between 31 August 1998 to 11 November 1998 (ie, the date of the call of the bank guarantee).

[75] From the court records it has been exhaustively displayed through various letters how the respondent had never confirmed the acceptance of delivery. It is also a fact that there was no attempt on its part to accept delivery of the contracted equipment.

[76] On 20 November 1998, the respondent filed an action and secured an *ex parte* order on 24 November 1998, *inter alia* to restrain the appellant from receiving payment of the sum of RM400,000 from the bank. It contended that the security of the bank guarantee lapsed on 7 December 1998. The respondent's agreement that it had made demands for delivery on 18 January 1999 was clearly unsustainable (being outside the date of 7 December 1998). Moreover the dispute between parties was already before the court by that date (18 January 1999). In fact this demand was not a pleaded fact or issue. It is trite that parties are bound by their pleadings. (*Isito Electronics Sdn. Bhd. v. Teh Ah Kiam & Anor* [2004] 3 CLJ 272; *Yew Wan Leong v. Lai Kok Chye* [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330). (Our emphasis).

[77] In fact when the respondent gave the appellant the notice as to time and place for delivery on 18 January 1999, the appellant requested that it be furnished with an additional bank guarantee for the balance of the products to be delivered. Appellant's request was refused by the respondent who then purported to treat the appellant as having repudiated the letter of award and that the respondent accepted the repudiation.

[78] The respondent's *inter parties* application for an interlocutory injunction was proceeded with but that was denied on 27 July 1999 and subsequently the bank released the sum of RM400,000 on 11 August 1999 to the appellant, amidst protests by the respondent.

[79] One of the respondent's allegations against the appellant was that it had made a fraudulent claim on the bank guarantee.

[80] This allegation of fraud was by the respondent and on it lies the burden of proving it beyond a reasonable doubt.

[81] However the learned trial judge, notwithstanding the above burden, accepted the evidence of the respondent witnesses on a balance of probabilities.

[82] The learned trial judge made findings of fact of delay on the respondent's part in accepting delivery between 31 August 1999 to 11 November 1998. The learned judge also found that there was breach on the respondent's part.

[83] This can be seen when the learned trial judge concluded that in the face of the respondent's refusal to accept delivery between 31 August 1998 to 11 November 1998, causing delay and breach and rejecting the respondent's submission, *the obligation to pay became due only upon delivery and that the failure of delivery by the appellant could not amount to it being a fraudulent claim (on the appellant's part) on the guarantee.* The learned trial judge however failed to appreciate the burden of proof on the respondent's part to negate the appellant's claim. (emphasis added).

[84] The learned trial judge also failed to put issues of fraud and/or dishonest intention to the appellant's witness. The learned trial judge had not shown how and in what manner the respondent had failed to establish how the appellant had been fraudulent. In fact the learned trial judge did not consider the question as to why the respondent did not put questions of fraud and dishonesty to the appellant's witnesses.

[85] In fact the learned trial judge failed to appreciate that the respondent had failed to call direct witnesses to contradict critical facts pointing to the refusal to accept delivery and/or inability to complete or proceed with the contractual obligations. The learned trial judge failed to appreciate that the meeting of 9 November

1998 had established the respondent's intention not to honour the obligation and/or reimbursing the appellant in the sum of RM10,000 and the existence of motive on the respondent's part for withholding and refraining acceptance which is manifest in the Stop Work order issued by Destine Computers Sdn. Bhd.

[86] The learned trial judge failed to appreciate that the substance of the respondent's claim is not for losses for breach of contract since they were not complaining of real contractual losses from alleged failure of delivery. The respondent's real complain was loss in the payment for the goods (*via* the bank guarantee). This was not appreciated at all by the learned trial judge. More importantly, the learned trial judge failed to appreciate that the respondent had failed to prove liability on the appellant's part and losses on its part.

[87] In fact the learned trial judge's decision spoke of post November 1998 events ie, delivery after 18 January 1998. This is a non-issue since these issues were not before the court.

[88] Thus we agree with the learned counsel for the appellant that the declaratory relief asked for is now rendered academic.

[89] Our decision is unanimous. We found that despite the findings of fact that the learned trial judge made in the appellant's favour, the learned trial judge misdirected himself when he ruled otherwise. As a result, we allow the appeal with costs. Costs (here and below) are to be paid to the appellant in the global sum of RM15,000.

Note: Since the appellant had made payment of RM582,025 on 19 June 2005 (receipt shown to court) in satisfaction of the order of the learned trial judge, consequential order of refund is to follow. The deposit is to be refunded to the appellant.